83-278

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TURNER ROBINSON BOBO, Petitioner,

v.

KENNETH DUCHARME, Superintendent, Washington State Penitentiary, and KEN EIKENBERRY, Washington State Attorney General, Respondents.

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Turner Robinson Bobo,	No. 82-3230
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Petitioner-Appellant,	C81-1249M
	ORDER
vs.	
KENNETH DU CHARME,* Superintendent, Washington State Penitentiary, and KEN EIKENBERRY, Washington State Attorney General,	
Respondents-Appellees.	

*Superintendent Kenneth DuCharme is substituted for his predecessor, Donald Look, pursuant to Federal Rule of Appellate Procedure 43(c).

Decided - April 15, 1983

Appeal from the United States
District Court
for the Western District
of Washington

Before: WALLACE, KENNEDY, and HUG, Circuit Judges

In light of In re Hagler, 97 Wash.2d 818, 650 P.2d 1103 (1982), of which the panel was previously unaware, and in light of the Washington Supreme Court's more recent decision in In re Hews, No. 48452-0 (Wash. March 3, 1983), the petition for rehearing is granted. The memorandum disposition filed February 9, 1983, is withdrawn and the attached memorandum disposition is substituted.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Turner Robinson Bobo,	No. 82-3230
	D.C. No.
Petitioner-Appellant,	C81-1249M
	MEMORANDUM
vs.	
KENNETH DU CHARME,* Superintendent, Washington State Penitentiary, and KEN EIKENBERRY, Washington State Attorney General,	
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*Superintendent Kenneth DuCharme is substituted for his predecessor, Donald Look, pursuant to Federal Rule of Appellate Procedure 43(c).

Submitted - December 27, 1982*

Decided - April 15, 1983

Appeal from the United States
District Court
for the Western District
of Washington
The Honorable Walter T. McGovern,
Presiding

Before: WALLACE, KENNEDY, and HUG, Circuit Judges

Bobo applied to the district court under 28 U.S.C. § 2254 for a writ of habeas corpus, asserting four bases for relief including a claim based on Mullaney v. Wilbur, 421 U.S. 684 (1975). The district court dismissed Bobo's habeas petition on the ground that the Mullaney claim was unexhausted.

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*The panel is unanimously of the opinion that oral argument is not required in this case. Fed.R. App.P.34(a).

See Rose v. Lundy, 102 S.Ct. 1198, 71 L.Ed.2d 379, 390 (1982).

Because Bobo has not presented his Mullaney claim to the state courts, that claim is unexhausted unless he can demonstrate that resort to state remedies would be futile. Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981). Although the Mullaney claim was not raised in the trial court or on direct appeal, the Washington Supreme Court has recently made clear that this claim may nonetheless be raised on collateral review if Bobo can show actual prejudice. In re Hews, No. 48452-0 (Wash. March 3, 1983). Accordingly, we cannot conclude that it would be futile

for Bobo to submit his Mullaney claim to the Washington courts.

The district court correctly dismissed the petition for failure to exhaust the Mullaney claim.

AFFIRMED.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
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Mullaney claim was unexhausted. See Rose v. Lundy, 102 S.Ct. 1198, 71 L.Ed.2d 379, 390 (1982).

Although Rose v. Lundy mandates dismissal if a habeas petition contains any unexhausted claims, a petitioner is not required to resort to state remedies that would be futile. Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981); see Engle v. Isaac, 102 S.Ct. 1558, 71 L.Ed.2d 783, 799 n.28 (1982). Mullaney was decided shortly after Bobo's trial and a year before the Washington appellate court affirmed his conviction. The Mullaney issue was not raised in the trial court or on direct appeal. The Washington Supreme Court has held that Mullaney will not be applied retroactively

in collateral review proceedings, In re Petition of Myers, 91 Wash.2d 120, 587 P.2d 532, 535 (1978), and that Mullaney claims that could have been but were not raised in the trial court or on direct appeal will not be considered on collateral review. In re Petition of Haynes, 95 Wash.2d 648, 628 P.2d 809, 812 (1981). Because submitting the Mullaney claim to the Washington courts would be futile, that claim is exhausted.

Although Bobo has effectively exhausted available state remedies on the Mullaney issue, the merits should not be considered by the district court unless Bobo can show that: (1) good cause existed for failing to raise the issue at trial

or on direct appeal; and (2) he was prejudiced thereby. See Engle v. Isaac, 102 S.Ct. at --, 71 L.Ed.2d at 801; Wainwright v. Sykes, 433 U.S. 72 (1977). On remand the district court should dismiss the Mullaney claim if the court determines that Bobo fails to meet the Sykes cause-and-prejudice test. The district court should, however, reach the merits of the other issues.

We REVERSE and REMAND to the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TURNER ROBINSON BOBO,	)	
Petitioner, v.	)	CASE NO. C81-1249M
	)	ORDER
DONALD LOOK, et al.,	)	
Respondents.	)	

The Court, having reviewed the petition for writ of habeas corpus, the Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the records and files herein, does hereby find and ORDER:

(1) Said Report and Recommendation is hereby approved and adopted;

(2) For reasons stated therein, the petition is dismissed

without prejudice for failure to exhaust state court remedies; and,

(3) The Clerk is to direct copies of this Order to counsel for petitioner and to Magistrate Sweigert.

DATED this 11th day of February, 1982.

/s/ Walter T. McGovern
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TURNER ROBINSON BOBO,	)	
Petitioner,	)	CASE NO.
v.	)	C81-1249M
	)	REPORT AND
DONALD LOOK, et al.,	)	RECOMMENDATION
Respondents.	)	

Petitioner, an inmate at the Washington State Reformatory, Monroe, filed the present petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging his 1975 drug conviction in state court. He contends that: (1) the trial court's instruction to the jury that possession of a controlled substance raises a presumption that the possession was unlawful, denied him due process by impermissibly

shifting the burden of proof to him; (2) the trial court's erroneous ruling and instruction to the jury that knowledge was not an element of illegal possession, violated his right to due process; (3) evidence introduced at trial was a product of an illegal search and seizure; and (4) the imposition of consecutive sentences for simultaneous possession of different drugs constitutes multiple punishment for a single offense, presumably in violation of the double jeopardy clause of the Constitution.

Examination of the petition and attachments under Rule 4, Rules Governing Section 2254 Cases, plainly shows that petitioner is not entitled to relief because he

has failed to exhaust state remedies under 28 U.S.C. § 2254(b). On appeal of his conviction he raised all of the issues presented except his claim that the presumption instruction impermissibly shifted the burden of proof. A failure to exhaust state remedies with respect to one issue presented in a habeas petition in this Circuit requires dismissal of the entire petition by the District Court. Gonzales v. Stone, 546 F. 2d 807 (9th Cir. 1976); Carothers v. Rhay, 594 F. 2d 225 (9th Cir. 1979). The petition here is, therefore, premature and must be dismissed without prejudice.

A proposed form of Order accompanies this Report and Recommendation.

DATED this 1st day of December, 1981.

/s/ Philip K. Sweigert
Philip K. Sweigert
United States Magistrate

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TURNER ROBINSON BOBO,	)	
Petitioner-Appellant,	)	
vs.	)	No. 82-3230
	)	DC CV 81-1249 WTM
KENNETH DU CHARME, Superintendent, Washington State Penitentiary, and KEN EIKENBERRY, Washington State Attorney General,	)	
Respondents-Appellees.	)	

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District

Court for the WESTERN District of WASHINGTON (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 15, 1983

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In the Personal Restraint Petitions of IAIN CHRISTOPHER HEWS, Petitioner,	)	No. 48452-0
SAMUEL PIETRO EVANS, Petitioner.	)	No. 48501-1
	)	FILED MAR 3 1983

STAFFORD, J.--Petitioner Iain C. Hews seeks review of a Court of Appeals opinion which held a Personal Restraint Petition collaterally attacking the validity of his guilty plea was procedurally barred by In re Haynes, 95 Wn.2d 648, 628 P.2d 809 (1981).

The State seeks review of a Court of Appeals opinion which granted a Personal Restraint Petition and vacated the guilty plea of Samuel P. Evans, relying on

In re Keene, 95 Wn.2d 203, 622 P.2d 360 (1980).

Since two Divisions of the Court of Appeals have reached inconsistent results on similar issues, we granted review. We reverse the Court of Appeals in both instances.

I

Petitioner Hews

Hews was charged with first degree felony murder stemming from an unsuccessful robbery attempt which ended in the death of the victim. As the result of a plea bargain the information was amended to charge second degree murder. On March 13, 1970, Hews entered a plea of guilty to the amended charge.

The following colloquy between the judge and Hews constitutes the

factual basis upon which the trial court accepted the guilty plea.

The Court: Mr. Hews, how old are you now?

The Defendant: Seventeen, Your Honor.

The Court: You have conferred with Mr. Guterson, your attorney, have you?

The Defendant: Uh-huh

The Court: I guess you know that the charge against you is Murder in the First Degree and the attorney and the prosecutor are offering to me that I sign an order which would allow them to change the charges against you to Murder in the Second Degree. Have you discussed that with your attorney?

The Defendant: Yes, Your Honor.

The Court: And you are aware that if you are charged with Murder in the Second Degree that means that intending to kill someone you did in fact take their life. You understand that?

The Defendant: Does that mean I intended to kill somebody?

The Court: Yes, that means you did an intentional act that you intended to kill them but that you didn't premeditate it, hadn't planned it.

The Defendant: I can't say that - I didn't intend to kill anybody.

The Court: Tell me what happened, young man.

The Defendant: I came in out of the alley and they were coming up the street and I hold [sic] them up. One of them went down and one came up the hill with me. He didn't come up the hill with me, he forced me up the hill about ten paces in front of me. And then I ran up this little hill. He waited until I got to the top and ran up. I started running and he chased me and I was sick. I knew I couldn't escape.

The Court: You said you had tried to hold him up?

The Defendant: Yes.

The Court: I think this young man knows what he is charged with and I think that those facts as he has recited them to me legally constitute Murder in the Second Degree. Counsel thinks so?"

Mr. Guterson: I do in every respect, Your Honor, and I am satisfied that the Defendant legally appreciates his peril and understands the original charge and amended charge, and that as an attorney and officer of the court I can assure the Court that I feel that the best advice that I am capable of giving him, I am satisfied is doing what is in his best interests.

The Court: From the statement he has made and from the testimony that I have heard from the doctor I am satisfied that he knows what he is charged with and that he knows what took place and that what took

place did in fact amount to Murder in the Second Degree, so that if he chose to plead guilty to it it is because he is guilty of it as a matter of fact and this is what I must insist upon in order to do my job.

I will allow the filing of an Amended Information.

You may arraign him on the Amended Information.

Mr. Guterson: We have already acknowledged receipt thereof, Your Honor, of a certified copy of the Amended Information and are prepared to waive the reading thereof, inasmuch as the Court has already indicated the subject matter thereof and I am satisfied that the Defendant understands the substance of the charge and I believe as his attorney that he is fully prepared and equipped at this time to enter a plea to the Amended Information charging Second Degree Murder.

(Italics ours.)

The court then informed Hews of the rights he would be waiving by entering a plea of guilty.

The Court: Mr. Hews, it is important that you understand and I think you do because you have a good lawyer, but I want to make sure you do, that you have a right to a jury trial on any of these charges. You know that, don't you?

The Defendant: Uh-huh.

The Court: If you would tell me you want a jury trial I would order the matter tried and a jury would determine what the facts are, and I want to make sure you understand that you have a right to have a trial by a jury. Do you?

The Defendant: I do.

The Court: And if you enter a plea then you don't have a right to appeal from what I do and you have to accept the penalty that I impose and so after a trial one has a right to appeal; after a plea one does not have a right to appeal, one has to accept then what the Judge does. And in a case of this nature the judge may decide that you go to the penitentiary and, if so, you have to accept that. You understand that?

The Defendant: Uh-huh.

The Court: From this young man's conduct I agree with the psychiatrist that he knows what is happening, he understands it and he knows the gravity of it.

What is your plea, Mr. Hews, to the charge of Murder in the Second Degree?

The Defendant: I plead guilty, Your Honor.

The Court: I will accept that plea. I am confident that he is receiving justice and knows what he is doing.

We note the trial court informed Hewe he was charged with second degree murder which meant he "intended" to kill someone and did in fact take a life. At that juncture Hews exclaimed "I can't say that--I didn't intend to kill anybody". Although he admitted attempting to "hold up" the victim the foregoing recitation of the facts reveals considerable confusion on Hews' part. Hews was sentenced to life imprisonment.

On October 27, 1981, the present Personal Restraint Petition was filed with Division One of the Court of Appeals. It appears to have been the first challenge of the guilty plea. The Court of Appeals dismissed the petition because the issues could have been

raised on appeal, but were not. Accordingly, the petition was deemed a collateral attack on the judgment, contrary to the dictate of In re Haynes, supra.

Without question, Hews failed to appeal the issues now raised in his Personal Restraint Petition. It is equally clear the petition's challenge of the guilty plea is a collateral attack thereon. These factors standing alone, however, do not prevent appellate review if the interest in finality of judgments is outweighed by claims of constitutional error actually prejudicing the petitioner.

Beginning with In re Myers, 91 Wn.2d 120, 587 P.2d 532 (1978), and continuing through In re Lee, 95 Wn.2d 357, 623 P.2d 687 (1980) and

In re Haynes, 95 Wn.2d 648, 628 P.2d 809 (1981), this court adhered strictly to the principle that issues, constitutional or non-constitutional, which were known or could have been known but were not raised at trial or on appeal, may not be raised in a collateral attack by a Personal Restraint Petition. The Myers-Haynes line of cases recognize a strong policy interest in the finality of judgments.

A dilemma arises when this interest must be weighed against a constitutional error that actually prejudices one who resorts to a Personal Restraint Petition. The need for reaching a balance in such cases was recognized in part in In re Keene, supra, and In re James,

96 Wn.2d 847, 640 P.2d 18 (1982). Unfortunately, these cases appear to have confused the issue, as illustrated by the conflicting views reached in these consolidated cases.

We recently addressed the dilemma in In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982). It was recognized therein that a Personal Restraint Petition is not a substitute for an appeal. We observed that collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs which require that collateral relief be limited. Hagler, at 824. Nevertheless, without abandoning

the Myers-Haynes line of cases, we concluded their rule was "too blunt an instrument for the delicate operation of determining claims which should be given collateral review". Hagler, at 826. The rule had caused inconsistent application in cases where the interest in finality of judgments was outweighed by constitutional errors actually prejudicing the petitioner. As pointed out in Hagler, at 826, under such circumstances we have in fact reviewed constitutional issues not raised on appeal. See In re James, supra; In re Keene, supra and In re Schellong 94 Wn.2d 314, 616 P.2d 1233 (1980).

In In re Hagler, at page 826, we recognized that the Myers-Haynes rule is out of step with the

federal courts. As was pointed out, it has created the possibility that "'our state's personal restraint procedure will come to be viewed as a necessary exhaustion of state remedies, rather than as a method by which serious constitutional claims may be heard'". In re Hagler, at 826 quoting from In re James, supra at 856 (Utter, J., concurring).

Following the federal guideline, Hagler adopted a new rule for Personal Restraint Petitions. As in the federal cases, we held that petitioner has the burden of demonstrating an actual prejudice created the alleged constitutional error. Neither the petitioner in Hagler nor the petitioner in the

companion case (In re Polk, consolidated in 97 Wn.2d 818, 650 P.2d 1103 (1982)) were able to show actual prejudice. We therefore specifically left open "the issue of whether we will consider a personal restraint petition in which the petitioner can show he was prejudiced by an error of constitutional dimensions which was not raised on appeal". In re Hagler, at 827. (Italics ours.) The instant Personal Restraint Petition raises the issue heretofore reserved in Hagler.

We hereby hold the failure to raise a constitutional issue for the first time on appeal is no longer a reason for automatic rejection of a Personal Restraint

Petition. Therefore, the State's contention that Hews had waived the right to challenge his guilty plea is without merit. Having determined that Hews is not procedurally barred from bringing his Personal Restraint Petition, we must proceed to determine whether he has shown actual prejudice stemming from a constitutional error.

The constitution requires that a plea of guilty be knowing, intelligent and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976). A plea is voluntary in the constitutional sense if the accused understands the nature and extent of the constitutional protections waived by pleading

guilty. Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). The accused must also be apprised of the nature of the charges against him, "the first and most universally recognized requirement of due process". Henderson v. Morgan, supra at 645. The Supreme Court has further stressed that a plea cannot be voluntary "unless the defendant possesses an understanding of the law in relation to the facts". McCarthy v. United States, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). See also United States v. Johnson, 612 F.2d 305, 309 (7th Cir. 1980). "At a minimum ... [an accused] would need to be aware of the acts and the requisite

state of mind in which they must be performed to constitute a crime." State v. Holsworth, 93 Wn.2d 148, 153 n. 3, 607 P.2d 845 (1980). As pointed out in Henderson v. Morgan, supra at 647 n. 18, "intent is such a critical element of the offense of second-degree murder that notice of that element is required". In other words, an accused must not only be informed of the requisite elements of the crime charged, but also must understand that his conduct satisfies those elements.

Without question the trial court informed Hews of the element of intent necessary for second degree murder but it was at this point that acceptance of the plea went awry. Hews stated specifical-

ly: "I didn't intend to kill anybody". At this juncture it became evident Hews was confused whether his conduct satisfied the critical element of intent. Unfortunately, the trial court's record does not explain or clarify this confusion.

We are therefore constrained to hold that, on the meager record before us, petitioner Hews has submitted a prima facie case demonstrating that his plea was constitutionally invalid. An invalid plea of guilty constitutes actual prejudice.

Reviewing courts have three options in evaluating Personal Restraint Petitions:

1) If a petitioner fails

to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;

2) If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;

3) If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

Because we find petitioner

Hews has made at least a prima facie case showing actual prejudicial constitutional error, the Court of Appeals is reversed and the cause is remanded for transfer to the appropriate trial court for a hearing on the merits pursuant to RAP 16.11(a) and RAP 16.12.[1] This being a collateral review, petitioner has the burden of establishing that, more likely than not, he was actually prejudiced by the claimed error. In re Hagler, at

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[1]It should be noted that at the time the issue in Hews' case was heard, the Court of Appeals did not have the benefit of In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982), which recognized the need to balance the State's interest in finality of judgments against a consideration of petitioner's constitutional claim of actual prejudice.

826.[2]

II

Petitioner Evans

The record indicates Samuel Evans was released from the Washington State Penitentiary for confinement at the Tri-Cities Work and Training Release Center. His Personal Restraint Petition concedes that while there he was authorized to go fishing with some friends on

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[2]Since this case is pre-Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976), the trial court is not limited thereby. The court may consider the totality of the circumstances surrounding the hearing. This may include the nature of the bargain for which the plea was given, the actual advice imparted by defense counsel, and any other fact that may be developed pertaining to Hews' knowledge of his constitutional rights, his awareness of the acts and requisite mental state necessary to constitute the crime as well as the ultimate voluntariness of his plea.

July 4, 1974 and did not return.

Upon his failure to return to confinement, the prosecuting attorney filed an information on July 9, 1974 charging Evans with:

> the Crime of Escape (RCW 72.65.070 committed as follows, to-wit: That ... Evans ... on or about the 5th day of July, 1974, ... wilfully, unlawfully and feloniously while being ... a prisoner of the Division of Institutions ... did ... fail to return to his designated place of confinement, to-wit: Tri-Cities Work and Training Release Center ... at or before the time specified ...

RCW 72.65.070 under which Evans was charged provides in pertinent part that:

> Any prisoner approved for placement under a work release plan who wilfully fails to return to the designated place

> of confinement at the time specified shall be deemed an escapee ...

Thus, the term "escape" is defined by the statute that designates the crime.

Evans was found in Utah a year later and was returned to the Washington State Penitentiary. The matter came on for arraignment on August 15, 1975 at which time Evans acknowledged he had received a copy of the information, that he had read it and had discussed it with his lawyer. Upon Evans' statement that he was ready to plead the trial judge took his plea of guilty.

Evans also filled out a "Statement of Defendant on Plea of Guilty" in which he stated, among

other things:

> I plead guilty to the crime of Escape, R.C.W. 72.65.070.

Thereafter, the trial judge noticed Evans had failed to complete the Statement and instructed him to write, in his own words, what he had done to commit the crime charged in the information. Evans wrote:

> I escaped from the Tri-Cities Work Release Facility in Pasco on July 5, 1974.

After questioning Evans concerning his understanding of the consequences of his plea, the court inquired:

> Court: You have indicated here that you escaped from the Tri-City Work Release--I can't read that--Facility in Pasco On July 5th, is that correct?
> Evans: Yes.

Prosecutor: That was a year ago, your honor, 1974.

The court then accepted Evans' plea.

Evans did not appeal but in 1981 filed the instant Personal Restraint Petition with Division III of the Court of Appeals. The Court of Appeals found merit in the petition on the ground that the record failed to provide a sufficient factual basis to support a guilty plea. The Court of Appeals vacated the judgment and remanded the cause for entry of a new plea.

The State petitioned for review asserting (1) the validity of a guilty plea may not be challenged initially in a Personal Restraint Petition; and (2) the Court of Appeals erred in holding

there were not sufficient facts in the record to support a voluntary guilty plea.

Contrary to the State's contention, we stated in Hews, above, that a guilty plea may be challenged initially in a Personal Restraint Petition under a proper constitutional and factual setting. The task of the Court of Appeals is to determine whether the petitioner has made at least a prima facie case demonstrating actual prejudice stemming from constitutional error. In the absence of a prima facie showing, the Personal Restraint Petition should be dismissed. We hold Evans failed to meet his critical burden. Thus, the Court of Appeals erred in failing to

dismiss Evans' Personal Restraint Petition.

To satisfy the requisite burden, petitioner Evans must show he suffered actual prejudice by pleading guilty to the crime with which he was charged. The basic question is whether Evans' plea was knowing, intelligent and voluntary. Henderson v. Morgan, supra. To answer this basic question, one must take a realistic approach to the facts as they existed on July 5, 1974 (the date Evans departed for Utah) and August 15, 1975, when he was returned to this state and arraigned.

It is obvious that Evans was well aware of his failure to return to his place of confinement on July

5, 1974. This is conceded in his Personal Restraint Petition. Further, it would stretch logic to assume that, after a year's absence from the work release center, the failure to return to confinement was anything but knowing.

Without question the record must reflect that the accused understood the nature of the charge and that he understood his conduct constituted the crime charged. McCarthy v. United States, supra; In re Keene, supra. In the instant case, Evans entered a plea to an information which clearly specified that he was charged with "the Crime of Escape (RCW 72.65.070)", a statutorily defined crime. Thereafter the information specifically

outlined the conduct said to constitute the crime of "escape".

Evans does not contend the acts alleged in the information do not constitute the crime of escape. Rather, he appears to assert his plea, which in essence says "I plead guilty to escape", does not contain sufficient facts to demonstrate he understood his conduct constituted escape. We do not agree.

Evans' statement should not be considered out of context. The record shows he received a copy of the information, read it and discussed it with his lawyer. Further, it is clear the information, in addition to the charge of "escape", sets out with specificity

Evans' conduct which constituted the crime of escape. Thus, Evans' guilty plea did more than acknowledge guilt to the mere title of a crime. Evans admitted having committed the crime as set forth fully and correctly within an information which he had read and discussed with his lawyer. In fact, the Statement of Defendant on Plea of Guilty signed by Evans in the presence of his lawyer, the prosecuting attorney and the judge says in part:

> 6. I plead guilty to the Crime of Escape, RCW 72.65.070 as charged in the information, a copy of which I have received.
>
> ...
>
> 13. ... I escaped from the Tri-Cities Work Release Facility in Pasco on July 5th, 1974.

(Italics ours.)

Evans' bare statement might not, standing alone, expressly contain all elements of the crime of escape. But, a fair reading of his statement in the context of the information (which Evans read and discussed with his lawyer) to which Evans pleaded guilty and which is a part of the record, contained a factual basis sufficient to support a valid plea. Consequently, we hold there were sufficient facts in the record to support a voluntary plea of guilty. Evans has therefore failed to make a prima facie showing of actual prejudice.

The Court of Appeals is reversed and the cause is remanded for reinstatement of the judgment

and sentence heretofore ordered vacated by the Court of Appeals.

III

The disposition of Hews and Evans, herein, completes the task begun in In re Hagler, supra. A petitioner will no longer be automatically barred from employing a Personal Restraint Petition to collaterally attack a guilty plea evidencing actual prejudice arising from constitutional error.

Henceforth it will be necessary for the court considering a Personal Restraint Petition to make a threshold determination by focusing on the existence of actual prejudice arising from constitutional error. The burden of proving actual prejudice rests with

the petitioner. Possible prejudice will not be sufficient.

As set forth above, a reviewing court has three options depending on the extent to which the petitioner has demonstrated actual prejudice arising from constitutional error. We emphasize that in the absence of at least a prima facie case, however, a Personal Restraint Petition must be dismissed.

In re Myers, supra, In re Lee, supra and In re Haynes, supra are overruled insofar as they are inconsistent with In re Hagler and these consolidated cases.

DOLLIVER, J. (dissenting)--While I concur in the disposition of the personal restraint petition

of Evans, I disagree with the result reached by the majority in Hews and dissent. The majority asserts "Hews has submitted a prima facie case demonstrating that his plea was constitutionally invalid." Majority, at 8. Given the circumstances at the time of Hews' guilty plea, I believe the record is overwhelming there was no prejudice.

The courtroom colloquies of Hews, the judge, and Hews' counsel are included in the majority and need not be repeated. To this I would add the statement of C. Richard Johnson, M.D., a psychiatrist who examined Hews on several occasions and testified as to Hews' competency to enter a plea. In response to further questioning

from the court, Dr. Johnson stated:

> Iain at this point and through the time that I have seen him has evidenced a trust in his attorney and a willingness to cooperate with his attorney in the preparation of his defense. Iain does know what he is charged with and the circumstances of what was involved and does realize the jeopardy that he is in as a result of these charges, and it is these basic considerations that lead me to feel that he is competent.

Hews was before the court on a plea bargain. The colloquy recorded in the majority opinion and the statement of Dr. Johnson demonstrates that Hews intelligently, understandingly, unequivocally, and voluntarily entered a plea of guilty, pursuant to a plea bargain, to a charge of murder in the second degree. Although defendant did

represent to the court he "didn't intend to kill anybody", his statements on the record show there was a criminal liability for murder in the first degree committed by means of a felony murder during the course of a robbery. When what is disclosed by the record is considered with the other circumstances of the case--that this was a plea bargain to second degree murder; and that Hews had the expert counsel of a highly skilled and competent attorney, as well as the observation and questioning of an experienced trial judge--I believe his claim, now nearly 13 years after the original hearing, that the plea of guilty is somehow tainted with unconstitutionality is without substance.

Hews made his bargain. He ought to be held to it even though he understandably may be weary of life at the Washington State Reformatory. State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980).

Under In re Hagler, 97 Wn.2d 818, 827, 650 P.2d 1103 (1982), some prejudice which rises to "an error of constitutional dimensions which was not raised on appeal" must be shown. I find no such prejudice here and thus I dissent.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS M. CONTRERAS,	No. 80-5783
	D.C. No. 80-266 PHX WEC
Petitioner-Appellant,	MEMORANDUM
vs.	
ROBERT R. RAINES,	
Respondent-Appellee.	

Argued and submitted - July 8, 1982

Decided - January 10, 1983

Appeal from the United States
District Court
For the District of Arizona
Walter E. Craig, District Judge,
Presiding

Before: ALARCON, POOLE, and BOOCHEVER, Circuit Judges.

Contreras appeals from the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The district court found that Contreras had failed to state grounds for which habeas corpus relief can be granted and accordingly dismissed the petition without an evidentiary hearing.

In its written order of dismissal filed July 2, 1980, the district court found that petitioner had exhausted all available state remedies.

On December 30, 1980, this court issued an order remanding this matter to the district court to determine whether Contreras was at fault for failing to appeal the

denial of his motion for post conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. The district court issued its order on February 11, 1981 in which it found that Contreras was not at fault for failing to appeal from the denial of motion for post conviction relief. In addition, the district court stated that "it appears that petitioner has exhausted available remedies in the state courts."

We do not reach the merits of Contreras' § 2254 petition because the petition contains both exhausted and unexhausted claims. Accordingly, we remand the case to the district court with instructions to dismiss the petition in accordance

with Rose v. Lundy, 102 S.Ct. 1198 (1982).

I.

Contreras was convicted of assault with a deadly weapon upon another inmate of the Arizona State Penitentiary. In his direct appeal to the Arizona Court of Appeals, he raised four issues, including two issues similar to those raised in the present petition: (1) that the trial court improperly allowed introduction of testimony regarding a prison code of silence for impeachment purposes; and (2) that the court improperly refused to allow subpoenas of witnesses in rebuttal of the "prison code" testimony. The Court of Appeals affirmed the conviction. State v.

Contreras 122 Ariz. 478, 595 P.2d 1023 (1979). The Arizona Supreme Court denied his petition for review.

Contreras then filed a pro se petition for post-conviction relief in the Pinal County Superior Court under 17 Ariz.Rev.Stat. §32. In the petition he argued that: (1) evidence introduced against him at trial was obtained pursuant to an unlawful arrest and search; (2) he was interrogated without Miranda warnings or assistance of counsel; (3) his fifth amendment rights were violated because at trial he was questioned regarding his prior convictions; (4) he was denied effective assistance of counsel because his attorney failed to file

any motions, challenge the evidence against him, conduct investigations prior to trial, or request a pretrial hearing; (5) the trial court failed to provide him with transcripts, thereby preventing him from preparing his case; and (6) reversal of his conviction was required because of newly discovered evidence-as eyewitness who stated someone other than Contreras was responsible for the stabbing. Contreras' attorney in the post-conviction proceedings filed a supplement to the post-conviction petition discussing only two of the issues, newly discovered evidence and ineffective assistance of counsel. The superior court dismissed the petition and Contreras

did not appeal the dismissal. Contreras asserts that he did request an appeal from the dismissal; presumably the request was made to his attorney. His attorney advised him that it was too late to appeal the denial.

Contreras then filed his habeas petition in district court pursuant to 28 U.S.C. § 2254. Contreras alleged the following grounds for relief: (1) the trial court erred in admitting into evidence the "prison code" testimony and in refusing to allow Contreras to subpoena and present witnesses to rebut the "prison code" testimony; (2) the prosecutor failed to disclose the prison code evidence to defense counsel prior to trial;

(3) he was denied effective assistance of counsel because his attorney failed to interview potential witnesses prior to trial; and (4) newly discovered evidence, an eyewitness, required an evidentiary hearing. The district court denied the petition and Contreras appealed. This court granted Certificate of Probable Cause on the basis that the failure of his trial counsel to interview any of the State's witnesses before trial presented a substantial question on appeal.

II.

As a matter of comity, a federal court will not grant a state prisoner's habeas petition unless the petitioner has exhausted

available state remedies. See 28 U.S.C. § 2254(b); Fay v. Noia, 372 U.S. 391, 415-20 (1963); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). A petitioner may satisfy the exhaustion requirement in two ways. First, the petitioner may provide the highest court with an opportunity to rule on the merits of the claim. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), cert. denied, 102 S.Ct. 1722 (1982); Carothers, 594 F.2d at 228. Second, the petitioner may satisfy the exhaustion requirement by showing that at the time the petitioner files the habeas petition in federal court no state remedies are still available to the petitioner.

See Engle v. Isaac, 102 S.Ct. 1558, 1570 n.28 (1982); Fay, 372 U.S. 391, 435 (1963). The district court must dismiss a habeas petition if the petition contains any unexhausted claims. Rose v. Lundy, 102 S.Ct. 1198, 1205 (1982).

Contreras presented to the Arizona Supreme Court only some of the claims presented in his federal habeas petition. The exhaustion requirement has been met as to those claims presented to the Arizona Supreme Court. Carothers v. Rhay, 594 F.2d at 228. Contreras, however, never presented his ineffective-assistance-of-trial-counsel and newly-discovered-evidence claims to the Arizona Supreme Court. If Arizona provides a procedure through which Contreras

may raise these issues, the federal habeas petition must be dismissed under Rose v. Lundy.

Contreras contends that he has no remedy available in the Arizona courts because of his failure to petition for review of the dismissal of his post-conviction petition within the ten days required by 17 Ariz.Rev.Stat. § 32.9. The Arizona Supreme Court, however, has held that the trial court may consider an untimely motion for a rehearing from the denial of a post-conviction petition if the petitioner presents a valid reason for noncompliance with the time limit. State v. Pope, 130 Ariz. 253, 635 P.2d 846 (1981). The Arizona Supreme Court plainly stated: "The time limits

(of Rule 32), then, are not jurisdictional." 130 Ariz. at 255, 635 P.2d at 848. The court also emphasized in Pope that the party asserting a valid reason for noncompliance with the time requirements bears a heavy burden of showing why the noncompliance should be excused. Id. at 256, 635 P.2d at 848-49.

In his petition, Contreras stated that he asked his attorney to appeal but that his attorney failed to do so and later informed him that it was too late. It is up to the Arizona Appellate Courts to determine if this constitutes a valid reason for Contreras' noncompliance with the Rule 32.9 time requirements. If Contreras moves

for leave to file a delayed petition for review, it is possible that the state court will excuse his noncompliance with Rule 32.9 and allow him to appeal the denial of his motion for post-conviction relief.

Accordingly, because Contreras may well have an available state remedy we remand the case to the district court with instructions to dismiss the petition under Rose v. Lundy. See also Rodgers v. Wyrick, 621 F.2d 921 (8th Cir. 1980); Hoover v. New York, 607 F.2d 1040 (2d Cir. 1979) (holding that a state prisoner petitioning for federal habeas relief should attempt to exhaust state remedies even where the federal court is not certain that the state court would

actually provide a remedy).

As noted in Rose v. Lundy, upon dismissal of the petition, Contreras will have the option of: (1) resubmitting an amended petition containing only exhausted claims or (2) exhausting available state remedies on the unexhausted claims and refiling the petition in federal court. 102 S.Ct. at 1204. If Contreras attempts to raise the unexhausted issues in state court and the Arizona courts refuse to consider the merits, it would then be clear that he has satisfied the exhaustion requirement on the basis that no state remedies exist. See Engle v. Isaac, 102 S.Ct. 1558, 1570 n.28 (1982). Rose v. Lundy would then no longer bar the filing

of his federal petition.

In these circumstances, we decline to reach the merits of Contreras' petition.

The findings and conclusions of the district court reflected in its order of February 11, 1981 are vacated. The district court was without jurisdiction to determine whether petitioner was at fault in failing to appeal the denial of his motion for post conviction relief.

The case is remanded to the district court with the directions to dismiss the petition under Rose v. Lundy, 102 S.Ct. 1198 (1982).

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that pursuant to Rule 28.3 of the Rules of the Supreme Court, I have made service of the foregoing Supplemental Appendix on counsel of record for Respondents by depositing in the United States Post office at Portland, Oregon, postage prepaid, on August 19, 1983, three certified true, exact and full copies thereof addressed as follows:

KENNETH O. EIKENBERRY
Attorney General
MICHAEL MADDEN
Assistant Attorney General
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/s/ John S. Ransom

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